

IC69GERS

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 CR 00776 (VEC)

5 JOSEPH GERARDI,

6 Defendant.

7 -----x
8 New York, N.Y.
9 December 6, 2018
2:02 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI.

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the
16 Southern District of New York

MATTHEW D. PODOLSKY

17 ROBERT BOONE

DAVID ZHOU

18 JANIS ECHENBERG

Assistant United States Attorneys

19 WALDEN MACHT & HARAN

20 Attorneys for Defendant

MILTON L. WILLIAMS, JR.

21 AVNI PRAFUL PATEL

JACOB SAMUEL GARDENER

IC69GERS

1 (Case called)

2 MR. ZHOU: Good afternoon, your Honor.

3 David Zhou, Matthew Podolsky, Robert Boone and Janis
4 Echenberg for the government.

5 With us at counsel table are Special Agent Deleassa
6 Penland and Paralegal Specialist Jonathan Concepcion.

7 MR. WILLIAMS: Good afternoon, your Honor.

8 Milton Williams here on behalf of Walden Macht & Haran
9 on behalf Mr. Gerardi with my colleagues Avni Patel, Jacob
10 Gardener and Arielle Gerber.

11 THE COURT: Good afternoon. Please be seated
12 everyone.

13 OK. At the close of the government's case the
14 defendant moved for a judgment of acquittal. The court
15 reserved decision. The defendant renewed his motion after the
16 jury's verdict, as did his codefendants, but no party submitted
17 briefing in support of their motions.

18 The defendant's motion is denied. I find that there
19 was sufficient evidence to support his conviction on each
20 count.

21 Mr. Williams, have you and your client read the
22 presentence report dated November 14, 2018?

23 MR. WILLIAMS: Yes, we have, your Honor.

24 THE COURT: Have you discussed it with each other?

25 MR. WILLIAMS: Yes, we have.

IC69GERS

1 THE COURT: Mr. Gerardi, did you read the presentence
2 report?

3 THE DEFENDANT: Yes, I did, your Honor.

4 THE COURT: Did you discuss it with your lawyer?

5 THE DEFENDANT: Yes, I did, your Honor.

6 THE COURT: OK. Please be seated.

7 Mr. Williams, are there any objections to the report?

8 MR. WILLIAMS: Yes. The objection is as to the loss
9 calculation.

10 THE COURT: We'll talk about that.

11 MR. WILLIAMS: OK.

12 THE COURT: The presentence report will be made a part
13 of the record in this matter and placed under seal. If an
14 appeal is taken, counsel on appeal may have access to the
15 sealed report without further application to this court.

16 I received a sentencing submission from the defense
17 dated November 19, 2018 that included many letters from members
18 of Mr. Gerardi's immediate and extended family, current and
19 former employees of his company, business colleagues, friends,
20 neighbors, and his priest.

21 For those of you who wrote me letters, thank you. I
22 read all of the letters.

23 Also from the defense I received a response to the
24 government's sentencing submission dated November 27, 2018, a
25 letter addressing forfeiture dated December 2, 2018, and a

IC69GERS

1 letter addressing bail pending appeal dated December 4.

2 I received letters from the government dated
3 November 19 and November 29, the latter pertaining to the
4 government's application for forfeiture.

5 I received a number of letters directly from the
6 public.

7 All have been posted to ECF.

8 I gave the parties notice of a possible upward
9 variance in an order dated November 27, 2018.

10 So the next step is a guidelines calculation but
11 before turning to that I need to determine what conduct of
12 Mr. Gerardi's I should take into account, specifically the
13 question is about acquitted conduct, whether I should consider
14 that either in my guidelines calculation or in my ultimate
15 sentence.

16 Mr. Zhou, would you like to be heard on that?

17 MR. ZHOU: Yes, your Honor.

18 So as the government set forth in its sentencing
19 submission, your Honor, the case law is clear that acquitted
20 conduct can be considered by the court at sentence. The
21 acquittals in the January trial indicate that the government
22 did not prove beyond a reasonable doubt that Mr. Gerardi
23 committed the crimes that were alleged as part of the Percoco
24 scheme. But we do submit that we have proved those by a
25 preponderance of the evidence, your Honor.

IC69GERS

1 And I should note that in Mr. Gerardi's letter dated
2 November 27, 2018 he acknowledges that the case law is clear
3 that the court can consider that conduct.

4 Now, your Honor, the government is not asking for the
5 court to either enhance the guidelines or seek an upward
6 departure under the guidelines as a result of that conduct.
7 But we submit that it is a factor that the court should
8 consider in assessing the characteristics of the defendant, his
9 history, as well as considering other factors under Section
10 3553(a) including the need for a specific deterrence, your
11 Honor.

12 THE COURT: Thank you.

13 Mr. Williams, would you like to be heard?

14 MR. WILLIAMS: Yes, your Honor. May I step over here?

15 THE COURT: Wherever you're most comfortable.

16 MR. WILLIAMS: So, your Honor, with regard to the
17 acquitted conduct and the government's burden to prove it by a
18 preponderance of the evidence, I'd like to deal with this in
19 two phases. One is to talk about the specific conduct in the
20 January trial. And the second then is to briefly go over what
21 we outline in our letter in terms of the constitutional
22 implications of using the acquitted conduct.

23 Now with regard to the January trial, your Honor
24 remembers. Mr. Gerardi was accused of paying Mr. Percoco,
25 bribing him, \$35,000 to do three specific things. And the

IC69GERS

1 government's now alleging that the government proved that by a
2 preponderance of the evidence during that trial.

3 The first thing was to get COR from out underneath the
4 application of the labor peace agreement which would be very
5 costly to them in the building of the construction projects in
6 the Inner Harbor. And if your Honor remembers from the first
7 trial, and I think this went a long way to Mr. Gerardi getting
8 acquitted, and I also think it tends to undermine the existence
9 of a scheme, which kind of undermines the government's
10 assertion that they proved it by a preponderance of the
11 evidence.

12 With regard to that specific prong, Maria Cassidy of
13 Empire State Development Corporation was called as a witness to
14 the stand. She had no ties to anyone in this case. In fact, I
15 gather that she would have loved not to have to testify in this
16 courtroom. She was a very credible witness. And she clearly
17 stated that she alone made this decision to -- after initially
18 determining that a LPA might be needed, decided that the labor
19 peace agreement was not needed on her own with no influence
20 from Mr. Percoco nor anybody else.

21 Moving on to the second prong, the second prong to
22 refresh your recollection.

23 THE COURT: Is the budget.

24 MR. WILLIAMS: Is the relief of funds that were owed
25 to COR in the two construction projects involved in the Buffalo

IC69GERS

1 Billions case. And Mary Beth Labate, again, a very credible
2 witness, someone who had no ties to anyone and I'm sure would
3 have preferred not to have to testify, came here and said she
4 made the decision to release the funds with no influence from
5 Mr. Percoco or anyone else. Again, I just reiterate the point
6 that tends to undermine the existence of a scheme and the
7 government's assertion that they proved it by a preponderance
8 of the evidence.

9 Lastly, was the raise issue regarding Steven Aiello,
10 Jr. And I summed up on it, I think I may have opened up on it,
11 and no one refuted me from the government's side that
12 Mr. Gerardi had absolutely nothing to do with that at all. His
13 name didn't come up. It wasn't on e-mails. Nothing. They
14 didn't argue it on summation.

15 So I would just, with regard to that prong, again, the
16 government has failed to prove that particular prong by a
17 preponderance of the evidence. And I just wanted to point
18 those, specifically with regard to the evidence in the last
19 trial, that out to you.

20 Then -- and I know your Honor read our letter, so --
21 then you have the constitutional implications. And although
22 under Second Circuit case law you absolutely can consider
23 relevant conduct, acquitted conduct. I understand that. There
24 are a couple of things I'd like to point out.

25 Here in this particular case -- if you look at -- I'm

IC69GERS

1 sorry, the Watts case, the Supreme Court case dealing with this
2 issue. The Booker case that came after Watts, the Watts case,
3 was also decided by the Supreme Court, specifically stated that
4 they really only dealt with the Fifth Amendment double jeopardy
5 clause whether or not using acquitted conduct, using acquitted
6 conduct violates the double jeopardy clause of the Fifth
7 Amendment. They didn't deal with the right to the jury trial
8 under the Sixth Amendment which we outline in our letter, nor
9 did they deal with the Fifth Amendment due process which I
10 think -- and let me just talk about that for a second, because
11 there you have the notion in the case that had been decided by
12 other circuits subsequent to Booker and also district courts,
13 where relevant conduct, relevant conduct is for factors or
14 facts dealing with the defendant's role in the crime, the
15 vulnerability of the victim, what I think is framed as
16 contextual matters, as opposed to facts that in and of
17 themselves would constitute a crime. I think the facts that
18 constitute a crime, when you have those -- the facts that
19 constituted a crime could have been chargeable. And in that
20 case, under the Fifth Amendment due process clause, they must
21 be decided by a jury. The burden of proof is beyond a
22 reasonable doubt. Then you had the other consideration we put
23 in the letter concerning the stigma attached -- the stigma
24 attached to a conviction and the fact that that's why under the
25 Fifth Amendment the burden of proof is beyond a reasonable

IC69GERS

1 doubt.

2 And then the last point, because it's all in the
3 letter and I don't want to belabor the point, but the last
4 point is this: If acquitted conduct were used in this
5 manner -- I understand that under the Second Circuit case law
6 right now you can do it -- but if acquitted conduct were used
7 in this manner, what is the incentive for anyone to go to trial
8 knowing that another case, if they're acquitted, can be used in
9 the current case. And here, most of the cases that discuss the
10 acquitted conduct are talking about cases where the acquitted
11 conduct was within the same case; so some counts the defendant
12 was acquitted on, others the defendant was convicted on.

13 Here you have two separate trials.

14 THE COURT: But it's all one case.

15 MR. WILLIAMS: I understand that, your Honor. But
16 it's still --

17 THE COURT: I mean we could have tried them all
18 together. If I had fewer defendants I probably would have.

19 MR. WILLIAMS: I do understand that point.

20 THE COURT: OK.

21 MR. WILLIAMS: They are two separate cases. Anyway
22 I'll rest on the submission. Thank you very much.

23 THE COURT: All right. Thank you.

24 The government does not ask me to take Mr. Gerardi's
25 acquitted conduct into account in my guidelines calculation but

IC69GERS

1 asks me to consider his participation in the Percoco bribery
2 scheme in weighing the required sentencing factors.
3 Mr. Gerardi objects to this approach but he concedes, as he
4 must, that I have the discretion to do it.

5 I believe the government's approach is appropriate. I
6 will not consider the Percoco bribery scheme when calculating
7 the guidelines. But at the same time I cannot close my eyes to
8 the persuasive evidence presented during the January trial.
9 Whether or not that evidence amounts to a federal crime as to
10 Mr. Gerardi is important evidence to consider when weighing the
11 required sentencing factors.

12 Accordingly, I accept the facts asserted in the
13 government's November 19 letter as true based on the evidence
14 cited, the credible testimony of Todd Howe, and Government
15 Exhibits 1219, 1706 and 1707. And in particular I find that
16 COR Development made bribe payments to Mr. Percoco, that
17 Mr. Gerardi was involved in making those payments, and that in
18 exchange Mr. Gerardi called on numerous favors from
19 Mr. Percoco, including assistance to lean on a state agency to
20 abandon the labor peace agreement requirement.

21 So the next step is the actual guidelines calculation.
22 For all of you who are here to support Mr. Gerardi, please bear
23 with me. I realize that this is somewhat gobbledygook.

24 The defendant was convicted on three counts: One
25 count of wire fraud conspiracy, one count of wire fraud, and

IC69GERS

1 one count of making a false statement.

2 The presentence report reflects a guidelines level of
3 27, criminal history category I, which yields a guideline range
4 of 70 to 87 months.

5 I find the correct guidelines calculation is as
6 follows. Pursuant to 3D1.2(b), Counts One and Two are grouped
7 for guideline purposes because one count of conviction is a
8 conspiracy, the object of which is the substantive count of
9 conviction. The false statement count is grouped with Counts
10 One and Two because it embodies conduct that is an obstruction
11 adjustment to the guidelines applicable to Counts One and Two.

12 So I start with the relevant guideline which is 2B1.1.
13 Because the statutory maximum for the offense of conviction is
14 20 years, 2B1.1(a)(1) sets the base offense level at 7.

15 The next step is the amount of loss under 2B1.1(b).
16 At the urging of the government, probation used the
17 construction fee that was paid to COR Development for the
18 projects they were awarded as a result of the rigged RFP
19 process as the amount of loss.

20 As you all know, I ruled on this issue in connection
21 with the Cimielli sentencing, but would the parties like to
22 take another whack at it?

23 Mr. Zhou.

24 MR. ZHOU: No, your Honor.

25 I think the government agrees with your Honor that

IC69GERS

1 it's clear there was an intended loss in this case and, as we
2 submit in our papers, we believe gain then can stand in for
3 that intended loss, but we accept the Court's ruling as the
4 Court set forth in the Cimielli sentence.

5 THE COURT: Then I'm not going to go through all of
6 the reasons why I don't think I can come up with a loss
7 calculation. I find that no loss enhancement is appropriate
8 and, therefore, that's a plus zero.

9 Pursuant to 3C1.1, the defendant willfully obstructed
10 justice by lying to the FBI about his efforts to tailor the RFP
11 to benefit COR as reflected by the verdict convicting him of a
12 violation of 18 U.S.C. 1001. So that's plus two.

13 That brings the total adjusted offense level to 9.

14 Mr. Gerardi has no prior criminal record so he has no
15 criminal history points. So he's in criminal history category
16 I. Level 9, criminal history category I yields a guideline
17 range of 4 to 10 months.

18 Pursuant to 5E1.2(h) the guideline for the applicable
19 fine as found in the 2014 guidelines manual, level 9 in that
20 manual yields a fine range of a thousand to ten thousand
21 dollars.

22 Now I will note that even if I agreed with the
23 government and found a loss enhancement based on the amount of
24 gain was appropriate, the guideline range would be 70 to 87
25 months and I would impose exactly the same sentence that I

IC69GERS

1 intend to impose.

2 Are there any guidelines arguments I have not
3 addressed?

4 Mr. Zhou.

5 MR. ZHOU: Not from the government, your Honor. Thank
6 you.

7 THE COURT: Mr. Williams.

8 MR. WILLIAMS: Not from the defense standpoint, your
9 Honor.

10 THE COURT: OK. Application note 21(a) of 2B1.1
11 provides that an upward departure may be warranted if the
12 offense level substantially understates the seriousness of the
13 offense. The application note specifically mentions offenses
14 that cause or risked substantial nonmonetary harm. That
15 describes the situation we have here.

16 Even if that departure were not applicable, an upward
17 variance might be appropriate.

18 In this case because of how the scheme worked it's not
19 readily apparent what the actual pecuniary loss to Fort
20 Schuyler was but it's clear that there was a risk of monetary
21 harm and there was substantial nonmonetary harm to Fort
22 Schuyler.

23 Are there any factual issues in dispute?

24 MR. ZHOU: No, your Honor.

25 THE COURT: I've sat through a trial so I don't think

IC69GERS

1 so but, Mr. Williams?

2 MR. WILLIAMS: No, your Honor.

3 THE COURT: Would the government like to be heard on
4 sentence.

5 MR. ZHOU: Yes, your Honor.

6 Your Honor, I'll only speak for a few minutes and I
7 want to focus in particular on the Section 3553(a) factors that
8 compel the court to consider the seriousness of the offense as
9 well as the need to promote respect for the law.

10 Now, the government is fully aware that the court
11 understands the gravity and the seriousness of the offenses
12 that were covered at the January trial and at the June trial.
13 The court has made that very clear at the sentencing of
14 Mr. Gerardi's codefendants, Joseph Percoco, Peter Kelly, and
15 Louis Cimielli.

16 Now, unlike those three defendants, your Honor,
17 Mr. Gerardi was actually involved in both of the schemes that
18 were at issue in the two trials. There was the egregious
19 bribery scam involving Mr. Percoco and there was the massive
20 bid rigging fraud that occurred with the Buffalo Billion
21 scheme.

22 Now, I think, your Honor, it's clear from the
23 defendant's submission that Mr. Gerardi doesn't recognize or
24 acknowledge the seriousness of those crimes. And he also shows
25 no remorse at all for his involvement in them.

IC69GERS

1 Furthermore, I think it was striking that Mr. Gerardi
2 seems to accept no responsibility for his own actions and his
3 own participation in those crimes.

4 I was particularly -- I took particular note of
5 Mr. Gerardi's sentencing submission, page 35 and 36 of that
6 submission. And in there Mr. Gerardi indicates that every
7 action was directed by Todd Howe and then he states that he was
8 fooled and tricked by Todd Howe who was a master manipulator.

9 Now, your Honor, that depiction of himself is
10 completely belied by the evidence that was presented in detail
11 in January and in June at the two trials.

12 Mr. Gerardi and his cofounder, Steven Aiello, at COR
13 they hired Mr. Howe and they engaged him, they paid him money,
14 in order to try to achieve a transformation of their company.
15 They wanted to take COR from being a construction developer
16 that built strip malls and Targets and they wanted to get
17 involved in public funding, they wanted to get involved in big
18 state projects, make themselves a big regional construction
19 player. Now that goal was so important to them, your Honor,
20 that they were willing to break the law in order to achieve
21 that goal.

22 Mr. Gerardi was not manipulated by Mr. Howe.
23 Mr. Gerardi was Todd Howe's partner in crime. They were
24 coconspirators and they committed these crimes together.

25 Now I find it amazing, your Honor, that Mr. Gerardi is

IC69GERS

1 still claiming that he had no active role in these crimes given
2 the evidence that was presented at the trials.

3 Now, I'll just cite two quick examples, your Honor.
4 From the Buffalo Billions side, your Honor might remember that
5 there were e-mails discussing audited financials which were a
6 requirement in the initial draft for the Syracuse RFP. That
7 was a requirement that COR did not meet and that they did not
8 want to meet. And so Mr. Gerardi put it in his handwritten
9 notes on the draft. He then followed up with an e-mail to
10 Mr. Howe emphasizing the importance of changing that
11 requirement. And when Mr. Howe wrote him back saying, I talked
12 to the relevant people, Mr. Kaloyeros, and got that changed.
13 Mr. Gerardi wrote back, "thank you." So, this is not
14 Mr. Gerardi being passive and being guided by Mr. Howe but
15 that's Mr. Gerardi actively trying to rig that RFP.

16 Now with respect to the Percoco bribery scheme, the
17 example comes from the labor peace agreement issue, your Honor.
18 Now Mr. Gerardi was the one who wrote the e-mail where he said
19 I think it's time to engage our labor consultant, using that
20 code language for Mr. Percoco, after it became clear that
21 Empire State Development was not going to accept the arguments
22 that COR was putting forth for why the LPA should not apply.

23 Furthermore, in November, as James Fayle, the regional
24 director out in Syracuse for ESD, was actually hounding
25 Mr. Gerardi to get on the phone to discuss the issue, to

IC69GERS

1 resolve the issue, Mr. Gerardi kept saying: I can't talk to
2 you; I'm busy. And in the meantime he was talking with
3 Mr. Aiello and Mr. Howe about making sure Joe Percoco took care
4 of that issue for them.

5 So, I think all of that evidence point -- and all of
6 the other evidence that was presented at trial, your Honor,
7 points to the fact that Mr. Gerardi was not a naive
8 businessman. He was a coconspirator in these two massive
9 public corruption schemes.

10 I think it's also important to note that Mr. Gerardi
11 knew better, your Honor. He was a lawyer. He was a practicing
12 lawyer. He was a member of the bar. And he was an officer of
13 the court. And yet he chose to engage in this criminal
14 activity.

15 Now, despite his background, despite his legal
16 education, his career in the law, it's clear that Mr. Gerardi
17 actually had very little respect for the law, which is another
18 factor under Section 3553(a).

19 I just want to touch on that briefly.

20 As I mentioned, your Honor, he participated in these
21 two schemes. And then when he was approached by the FBI he
22 chose to sit for a proffer interview and lie.

23 Now he could have declined to speak. He could have
24 invoked his rights and refused to meet with the government but
25 he didn't. Instead, he came in, your Honor, and he tried to

IC69GERS

1 conceal his crimes and he tried to lie about them in order to
2 obstruct the investigation that the FBI was conducting.

3 Now, I think here, again, Mr. Gerardi has shown that,
4 just like Mr. Ciminelli and Mr. Percoco, he has no contrition
5 and he accepts no responsibility for his involvement in these
6 criminal acts.

7 Mr. Gerardi was the one who chose to come in and lie
8 to federal investigators. And yet even today he continues to
9 try to cast some blame on the government for his own decision
10 to lie.

11 Now, finally, your Honor, I want to very briefly
12 address the issue of deterrence and I think here the issue of
13 specific deterrence actually might play a role because under
14 the PSR it seems that Mr. Gerardi continues to play a role in
15 the COR Development Construction Company.

16 Now, because of the trial and hopefully with the
17 evidence that was presented with people understanding what
18 Mr. Gerardi and COR -- and Mr. Aiello did here, hopefully they
19 won't have the opportunity to engage in future crimes but,
20 unlike Mr. Ciminelli whose business has gone out of business,
21 it appears that Mr. Gerardi is still working.

22 And then, of course, your Honor we stress the
23 importance of general deterrence in this field as well.

24 And all of those factors as well as what we put in our
25 submissions, your Honor, I think all of that supports the

IC69GERS

1 imposition of a substantial sentence of imprisonment.

2 THE COURT: Thank you, Mr. Zhou.

3 Mr. Williams.

4 MR. WILLIAMS: Yes.

5 Your Honor, let me start by saying this. Both
6 Mr. Gerardi and Mr. Aiello have stepped back from their roles
7 at COR.

8 THE COURT: What does that mean?

9 MR. WILLIAMS: It means that they're no longer active
10 participants, OK.

11 THE COURT: They still hold their shares?

12 MR. WILLIAMS: They own their shares but they're not
13 involved, your Honor. The business has been flipped on its
14 head for lack of a better term. COR was a bedrock company in
15 Syracuse. It has done a lot of good for the community and
16 employs a lot of people. And even during this -- the whole
17 proceeding which I've been involved in for two years the
18 company has taken a hit. And the partners at COR have done
19 everything they could to avoid layoffs, taking pay cuts
20 themselves, not taking distributions, in order to keep the
21 employees employed. And there's a lot of them. And there's a
22 lot of small business owners, a lot of small business entities
23 that relied on COR and do business with them. So it's a little
24 bit -- it's not as cut and dry as the government is pointing
25 out.

IC69GERS

1 The other thing I will point to is this, your Honor.
2 You cannot ignore -- and this is not even a sympathy plea --
3 you cannot ignore a whole lifetime of good work and generosity.
4 Mr. Gerardi came from nothing. He basically had to raise his
5 brothers and sisters. He raised his family. He had to help --
6 help his mother. He started working when he was twelve years
7 old. He worked his way through college and law school. He did
8 everything on his own. Nothing was given to him at all.

9 There's a lot of nice success stories like that. This
10 is one of them. And if you look at all of the letters you can
11 see that Joe Gerardi is a selfless and generous individual.
12 He's an individual who gives when it's not convenient to give.
13 An individual who gives, OK, when he's going through a hard
14 time.

15 For instance, on the day he was arrested in this very
16 matter, after he finished in court, he then went home and
17 did -- he's very involved in the boy scouts and did a whole, I
18 think, a hundred kids came over and he cooked food for them the
19 very day he got arrested.

20 And the letters all point this out. You see this. So
21 when I'm saying is this -- whatever the involvement, OK, here
22 is -- and, look, Mr. Gerardi is not making a statement because
23 I'm not letting him because obviously we're appealing. I think
24 if he had an opportunity to talk he'd say a lot of things to
25 you about how he's sorry, how he's sorry he was here, how he's

IC69GERS

1 sorry for what he's done to his family, how he's sorry he took
2 up your time. I think a lot of that would come out. That's
3 not happening because of me.

4 But, in any event, you cannot ignore a whole lifetime,
5 a body of work of generosity and selflessness. And you
6 particularly cannot ignore it in the face of the fact that,
7 look, these guys were minding their own business, and I don't
8 want to relitigate the case, and then an individual they
9 respected greatly, Tom Young, introduced them to Todd Howe
10 because they were looking to expand the business.

11 I guess if you look over the record and all the
12 e-mails like I did, in retrospect you want to go say: Hey,
13 Joe, you can go say: Hey, Steve, like why didn't you just get
14 rid of this guy? I understand, the same comment your Honor
15 made in the middle of the first trial when you said: I can't
16 for the life of me understand why your clients -- I get all
17 that.

18 But what I'm saying is this is aberrational behavior.
19 The deterrence factor that Mr. Zhou speaks to, he and his wife,
20 their family's lives have been flipped upside down. And
21 Mr. Gerardi is not pushing the responsibility off on the
22 government or anybody else but himself for what he's done, for
23 what has happened to his family, and for what's happened to the
24 company. So there's -- in many ways he's acknowledging what
25 has happened and he continues to beat himself up about it.

IC69GERS

1 So, there's full acceptance of responsibility in that
2 regard. And you've got to understand, your Honor, Todd Howe
3 was indeed a master manipulator. He's so good -- I don't mean,
4 I'm not being sarcastic with the government, but he's so good
5 that not only did he mislead people in the executive chamber,
6 he was able to mislead the government, and they made a very
7 prudent choice in not using him in the second trial.

8 So it's conceivable that, you know what, Mr. Gerardi
9 followed behind Todd Howe. And at some point, your Honor,
10 maybe he should have realized what -- maybe I should just pull
11 out, this is ridiculous. But you know what, he didn't and
12 that's why he's here. But there's a whole life body of work
13 that he did, a whole record of generosity that continues.

14 I can only speak to my own experience and I'm pretty
15 jaded. So when I got involved in the case Joe and Steve and
16 all these people here, the entire COR family treated me like
17 family. So being as jaded as I am, I thought, you know, yeah
18 they're just being nice because they need me -- need my help.
19 But I got to tell you it's much more than that. That's who
20 they really are. They are sincerely generous, giving people.
21 They treated me like family the whole time throughout the two
22 years. And there's been a lot of ups and downs, as you're well
23 aware, and the graciousness has not changed one bit. Even
24 today Joe is asking me how I'm doing.

25 So, I understand that your Honor is going to do what

IC69GERS

1 she has to do. But I don't like the stark way that Mr. Zhou
2 portrayed Mr. Gerardi or COR. It's a lot bigger than that.
3 Notwithstanding that we respect -- that I respect the jury's
4 verdict because that's why we have this system.

5 And that's it, your Honor. Thank you very much.

6 THE COURT: OK. All right. Mr. Gerardi, Mr. Williams
7 told me that you're not going to speak but I want to make sure
8 that I ask you. Do you want to be heard?

9 THE DEFENDANT: Your Honor, I appreciate the
10 opportunity to be heard but I have nothing to add to
11 Mr. Williams' comments. Thank you.

12 THE COURT: Mr. Gerardi, federal law requires me to
13 consider the nature and circumstances of the offense and the
14 history and characteristics of the defendant.

15 Mr. Gerardi is a 59-year-old lawyer who has been
16 married for over 30 years. He has three children, one of whom
17 is in college, and twins who are in high school.

18 I think it's fair to say that Mr. Gerardi came from
19 humble beginnings. His father was an alcoholic who left his
20 mother with six children when the defendant was not yet a
21 teenager. The defendant put himself through school, ultimately
22 graduating with a law degree from Syracuse.

23 The defendant was a founding partner of COR and I
24 think it's fair to say has become wealthy and -- become a
25 wealthy and successful businessman in Syracuse.

IC69GERS

1 I've read all of the letters that the defense sent me
2 on behalf of Mr. Gerardi. To summarize the characteristics of
3 Mr. Gerardi that this letter writers expressed, he is generous
4 with his time, he is personally decent and compassionate. He
5 is quite active in boy scouts, having been a pack leader when
6 his boys were cubs and a troop leader when they were boy
7 scouts. Both sons are eagle scouts. Congratulations,
8 Mr. Gerardi, to you and your wife. That's an accomplishment.
9 He's also a longtime volunteer with the Salvation Army, which
10 is a wonderful organization, and his employees love him.

11 Nevertheless, the letters leave me troubled about
12 Mr. Gerardi. One of the letters from a legal assistant in
13 Fayetteville said the following about her interactions with
14 Mr. Gerardi when COR was planning and constructing the town
15 center in 2001. She wrote, "Joe would call several times a
16 week to get directions from attorneys in the firm. He wanted
17 to make sure that everything was done by the book. Joe did not
18 want approvals, variance, etc. to be held up because of cutting
19 corners. He wanted everything to be done correctly."

20 I have to wonder what happened to that Joe Gerardi.
21 What I saw during these two trials was a Joe Gerardi who was
22 willing to cheat on an RFP by secretly rigging it to meet COR's
23 characteristics. I saw a Joe Gerardi who, upon being told by
24 an attorney that COR would need an LPA to obtain state grant
25 money to build a parking lot, did not engage with the person

IC69GERS

1 making the call but instead called in political chits to get
2 what he wanted. Regardless of whether that conduct was part of
3 an illegal bribe scheme, it was not the action of the squeaky
4 clean lawyer the legal assistant remembers from 2001.

5 The fact that Mr. Gerardi was willing to cheat on the
6 RFP leads me, of course, to wonder: How much of his and COR's
7 success is the result of him acting sneakily and dishonestly,
8 in absolute contravention of those boy scout values that he
9 inculcated in boys over all these years. Maybe none. But this
10 is precisely the problem with corruption, which is what I said
11 when I sentenced Mr. Ciminelli. Once corrupt gets involved it
12 leaves everyone wondering whether anyone has achieved anything
13 based on the merits.

14 Throughout the June trial the defense attorneys argued
15 strenuously that what happened there was not a crime. They may
16 ultimately persuade the circuit or the Supreme Court that
17 they're right. But what I know, what I believe Mr. Gerardi
18 knew at the time, is that what he did in connection with the
19 RFP was deeply wrong and it was contrary to what Mr. Gerardi's
20 friends believe are his core values.

21 I saw proof that he knew what he did was wrong. When
22 Mr. Gerardi thought the bid rigging was too obvious he wrote,
23 "too telegraphed," and told Todd Howe to change it.

24 When Mr. Gerardi was given the opportunity to explain
25 what happened with the RFP process, he lied to the FBI. If he

IC69GERS

1 didn't think he had done anything wrong, why lie?

2 In terms of the nature and circumstances of the
3 offense, there are few crimes more serious than public
4 corruption. Mr. Gerardi was not himself a public official but,
5 in cahoots with Kaloyeros who was a public official, he
6 knowingly and intentionally defrauded Fort Schuyler.

7 The seriousness of the offense is not reflected by the
8 guidelines calculation which ignores the nonmonetary harm
9 caused by this crime. Economic development projects like the
10 Film Center and the Soraa facility are important and valuable
11 to the state. But the value is undermined if the process is
12 not fair to everyone involved. That means it's actually fair
13 and it's perceived to be fair. This process was neither.

14 When corruption creeps into economic development
15 projects it erodes citizens' faith their tax dollars are being
16 spent responsibly. The more that faith is eroded, the less
17 likely public officials are to stick their necks out to support
18 controversial economic development projects that will bring
19 needed jobs into the state.

20 In short, the seriousness of Mr. Gerardi's crime is
21 that it caused nonpecuniary losses, the loss of the
22 taxpayer-supported university's ability to control its assets,
23 the loss of confidence by the citizens of New York in a billion
24 dollar economic development initiative, and the loss of an open
25 and transparent process in deciding how government funds will

IC69GERS

1 be spent.

2 Taking all of that into account federal law requires
3 me to impose a sentence that is reasonable and no greater than
4 necessary to accomplish the goals of sentencing.

5 I've considered all of the required sentencing
6 factors. I will only discuss the factors that I believe are
7 most important as to this defendant.

8 I start with the seriousness of the offense. As I've
9 indicated previously, there are few crimes that are more
10 serious than public corruption.

11 I've considered the need to promote respect for the
12 law. Judging from the letters I received, many who know
13 Mr. Gerardi believe that he is an upright solid citizen who
14 always tries to set a good example for those around him. But
15 as indicated, this trial revealed another side of him. Putting
16 aside the fact that I have heard no remorse other than he's
17 sorry that his wife got dragged through this, I also have heard
18 no evidence that makes any sense to me of why he did this.

19 My gut tells me that the scheme originated with Todd
20 Howe. Howe, who was paid by COR and CNSE, wanted to keep all
21 of his benefactors happy. Now let me say while I think Howe
22 may have been the moving force, I reject the notion, because I
23 saw no evidence of it, that Mr. Gerardi did not know exactly
24 what he was doing.

25 But nevertheless, I think Howe's motive was to keep

IC69GERS

1 all of his benefactors happy. Guaranteeing that COR won the
2 RFP would keep Mr. Gerardi and Mr. Aiello happy who were, after
3 all, paying him a lot of money. If Gerardi and Aiello were
4 happy, the governor's office would be happy. If the governor
5 was happy, Alain Kaloyeros would be happy. If all those people
6 were happy, then Howe had done his job and the dollars would
7 keep rolling in.

8 But if I'm right that this scheme originated with and
9 was nudged along by Howe, that would be precisely the time when
10 real integrity would come into play. It's easy to act in an
11 upright way if you're not being tempted. A person who really
12 respects the law would have told Howe and Kaloyeros: Thanks,
13 but no thanks; COR will compete and win on the merits; it does
14 not need to cheat.

15 I am not considering the counts on which Mr. Gerardi
16 was acquitted during the first trial. Whether Mr. Gerardi was
17 part of an illegal bribery scheme is not relevant to my
18 sentence. But I can't close my eyes to the facts that came out
19 during that trial, especially the uncontroverted evidence that
20 I alluded to before about how Mr. Gerardi dealt with the LPA
21 issue.

22 Whether this conduct was legal or not legal,
23 Mr. Gerardi showed no respect for the process. He was above
24 it. He had his guy who had influence. Getting what he wanted,
25 even if it involved getting Percoco to wield influence was more

IC69GERS

1 important than working with the public servants who were
2 charged with administering the project.

3 For months Mr. Gerardi left calls from those public
4 servants unanswered while he leaned on his man from the
5 governor's office to make the problem go away. And when he got
6 what he wanted, he laughed and he demeaned those public
7 servants who had just been trying to do their job.

8 I've considered the need to impose just punishment
9 while avoiding unwarranted disparities. The issue with this
10 factor is it's hard to draw good parallels between different
11 cases handled by different judges. In this case I see
12 Mr. Gerardi as roughly equal in culpability to Aiello and
13 Cimielli and less culpable than Kaloyeros or Percoco. I would
14 note, however, that Cimielli's health was a significant factor
15 in his sentence.

16 I view Mr. Kelly in a different category because he
17 pled guilty, accepted responsibility for his crime, and
18 expressed remorse.

19 I've considered the need to deter criminal conduct.
20 There are two aspects of deterrence, specific and general. I
21 disagree with Mr. Zhou that specific deterrence is a major
22 factor here. I agree with you, Mr. Williams, that I think
23 Mr. Gerardi has for the most part lived a law-abiding life.
24 This is a sad day. There is no way around it.

25 But general deterrence, that is, how do we deter

IC69GERS

1 people generally from committing crimes, in connection with
2 this sentence is a huge factor. As I've said and will say for
3 all of the sentencings in this case, I hope these sentences
4 will be heard around the state. This prosecution, which has
5 been devastating to the Gerardies and to Joe Gerardi himself,
6 should serve as a warning to others who interact with the
7 government everywhere. When you're competing for state
8 projects, including projects run by entities like Fort
9 Schuyler, you are vying for state money. That means you must
10 be purer than pure because the money you are trying to get
11 comes from hardworking New Yorkers. If you can't live with
12 that, then stick to private sector work. Because if you remain
13 at the public trough and you engage in corruption, you engage
14 in corrupt means to get to that public money, even if you did a
15 good job for the public, the court will show you no mercy no
16 matter how many nice letters I receive.

17 Finally, I've considered the sentencing guidelines.
18 As indicated previously, the guideline I find applies calls for
19 a sentence of four to ten months. I believe that is not
20 reasonable and it is less than necessary to achieve the goals
21 of sentencing.

22 Taking all of this into account, and recognizing that
23 you have generally lived a good life filled with good works, I
24 sentence you to the custody of the Attorney General for a
25 period of 30 months on Counts One, Two, and Sixteen concurrent,

IC69GERS

1 to be followed by a period of supervised release of two years
2 on each count concurrent.

3 I've also considered all of the factors regarding
4 imposition of a fine. Regardless of whether Fort Schuyler
5 experienced a calculable pecuniary loss, cheating on the RFP
6 resulted in financial benefit to COR which in turn benefited
7 Gerardi. So, a fine is appropriate.

8 In setting the amount of the fine, I've considered the
9 guideline range, which is laughably low given this defendant's
10 conduct, as well as his financial resources, the fact that a
11 fine will not impose an undue financial burden on any one of
12 his dependents, the fact that no restitution was sought for the
13 expected cost to the government of imprisonment.

14 Taking all of those factors into account, I am
15 ordering Mr. Gerardi to pay a fine of \$250,000 on Counts One
16 and Two to run concurrent to each other and a fine of \$250,000
17 on Count Sixteen consecutive for a total fine of \$500,000. The
18 fine must be paid within 30 days of today.

19 I note that there's a dispute over forfeiture. And
20 we'll discuss that in a moment.

21 I would note, though that I will impose the same fine
22 regardless of whether forfeiture is or is not ordered and
23 regardless of the amount of forfeiture that might be ordered.

24 There are mandatory conditions of supervised release.

25 You must not commit another crime.

IC69GERS

1 You cannot illegally possess a controlled substance.

2 You cannot possess a firearm or other destructive
3 device.

4 I'm going to waive mandatory drug testing because I
5 find the risk of drug abuse is low.

6 The defendant must cooperate in the collection of DNA.

7 In addition to the standard conditions of supervision,
8 I am imposing the following special conditions.

9 The defendant must provide the probation office with
10 access to any requested financial information.

11 The defendant must not incur new credit charges or
12 open additional lines of credit without the approval of the
13 probation officer unless he's in compliance with the payment
14 schedule.

15 The defendant must report to the nearest probation
16 office within 72 hours of release.

17 And he'll be supervised by the district of residence.

18 I must impose a \$300 special assessment.

19 I've got a letter from the defendant regarding bail
20 pending appeal. Mr. Zhou, would you like to be heard on that?

21 MR. ZHOU: Yes, your Honor.

22 The government would like to request a week, your
23 Honor, to put in a responsive writing.

24 THE COURT: That's fine. I'll actually give you a
25 little over a week. Your response is due December 14.

IC69GERS

1 Any reply, Mr. Williams, is due December 20.

2 MR. WILLIAMS: Thank you, your Honor.

3 Your Honor, I think there's one other matter. Can I
4 request, make a special request of the court to consider
5 recommending a facility for Mr. Gerardi?

6 THE COURT: I'll get to that in just a second.

7 MR. WILLIAMS: Sure.

8 THE COURT: I'm going to allow the defendant to
9 surrender himself to the designated facility. If the defendant
10 does not persuade me that he's entitled to bail pending appeal,
11 he's must surrender to the designated institution by noon on
12 March 1, 2019. If no facility has been designated, he must
13 surrender to the United States Marshal in the Southern District
14 of New York by that time.

15 If I grant bail pending appeal and if the Second
16 Circuit affirms his conviction, then he'll need to surrender 60
17 days following the issuance of the mandate.

18 What's your request for designation, Mr. Williams?

19 MR. WILLIAMS: I believe it's the Canaan Facility at
20 Wal-Mart, Pennsylvania.

21 THE COURT: Canaan Facility?

22 MR. WILLIAMS: Yes. It's C-A-N-A-A-N, I believe.

23 THE COURT: At where?

24 MR. WILLIAMS: It's in Wal-Mart, PA.

25 THE COURT: Wal-Mart?

IC69GERS

1 MR. WILLIAMS: Yeah, Wal-Mart, Pennsylvania.

2 THE COURT: Like the store?

3 MR. WILLIAMS: Yes, your Honor.

4 THE COURT: OK. Mr. Gerardi, I'm happy to make that
5 request. Understand that all I can do is request. It's up to
6 the Bureau of Prisons where they're going to put you.

7 I received a letter from the government regarding
8 forfeiture and I received an objection to my entering a general
9 order of forfeiture with the amount to be decided later.

10 Mr. Williams, would you like to be heard further on
11 that?

12 MR. WILLIAMS: Other than the letter, your Honor?

13 THE COURT: Yes.

14 MR. WILLIAMS: No.

15 THE COURT: All right. Your objection is overruled.
16 I'm going to enter a general order. The parties are ordered to
17 attempt to work out the amount of forfeiture. If you cannot,
18 the government's brief both on the standard that should be
19 applied as well as the appropriate amount of forfeiture is due
20 January 11, 2019. The defense response is due January 25,
21 2019. The government's reply is due February 1, 2019.

22 Mr. Gerardi, you have the right to appeal your
23 conviction and sentence. If you're unable to pay the cost of
24 an appeal you may apply for leave to appeal in forma pauperis.
25 The notice of appeal must be filed within 14 days of the

IC69GERS

1 judgment of conviction.

2 Anything further from the government?

3 MR. ZHOU: No, your Honor. Thank you.

4 THE COURT: Anything further from the defense?

5 MR. WILLIAMS: No, your Honor. Thank you.

6 THE COURT: OK. There are open counts.

7 MR. ZHOU: Yes, your Honor. The government does move
8 to dismiss those open counts.

9 THE COURT: Anything open and underlying is dismissed.

10 Thank you all.

11 (Adjourned)